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Hylebos NRDA Settlement Proposal Comments
Attn: Ms. Gail Siani and Mr. Robert A. Taylor
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Subject: Comments of Zidell Marine Corporation to Hylebos Waterway Natural
Resource Damage Settlement Proposal Report

Dear Ladies and Gentlemen:

We have reviewed the March 14, 2002 Hylebos Waterway Natural Resource Damage Settlement Proposal Report ("Proposal") submitted by the Natural Resource Trustees ("Trustees"). Zidell Marine Corporation ("Zidell Marine") has the following comments regarding the Trustees' NRDA Settlement Proposal.

I. The Trustees' Application of the HEA Model to the Hylebos Site is Flawed in Principle.

The Trustees state in the Proposal that they believe an appropriate measure of natural resource damages is to use the habitat equivalency analysis ("HEA") process to calculate "discounted service acre-years" ("DSAYs"). The DSAY total purportedly represents the sum of ecological services lost to contamination. Proposal at ES-2. The Trustees note that the HEA process "has been used successfully in a number of natural resource damage cases around the country." *Id.* at 4. The cited examples are cases where the HEA model was used to evaluate environmental damage from the loss of seagrass incident to treasure hunting, the loss of seagrass from a pipe transportation incident, and the contamination of a creek bed from mine tailings. In each of these cases, the natural resource injuries involved and the determination of the cause of the injury was straightforward and fairly simple. Zidell Marine would agree with the Trustees that the HEA model should be able to measure natural resource damages in such situations (an easily identifiable injury and a known causal factor).

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By contrast, the Hylebos Waterway presents multiple layers of complexity that defy the simple assumptions of the HEA model. The Hylebos is part of a large, complex system that includes Commencement Bay and Puget Sound. It is difficult to isolate the Hylebos from that larger system, in terms of impacts to natural populations. It is difficult to accurately estimate the pre-injury ecological services provided by the Hylebos Waterway or to precisely identify the causes of the injury. Contamination of the Hylebos, Commencement Bay and Puget Sound has taken place over more than one hundred years. In that time, thousands of entities including some of the Trustees, have played a role in degrading the ecological services provided by the Hylebos Waterway. Numerous causes of environmental injury to the Hylebos and adjacent areas have occurred, quite apart from the hazardous substances that are the exclusive focus of the HEA analysis. These sources include the channelization of waterways that began in the 1920's, the growth of the Tacoma area and resulting municipal waste discharges, and the sedimentation of waterways from development, forestry, and agriculture. The HEA model does not address these factors, nor does it adequately address factors such as heated discharges into the Hylebos that may impact species as significantly as historically-contaminated sediments.

Courts have held that the use of the HEA methodology is appropriate when

(1) the primary category of lost on-site services pertains to the ecological/biological function of an area; (2) feasible restoration projects are available that provide services of the same type, quality, and comparable value to those that were lost; and (3) sufficient data on the required HEA input parameters exist and are cost effective to collect. United States v. Fisher, 977 F.Supp. 1193 (S.D.Fla. 1997).

In the case of the Hylebos Waterway, the Trustees have not satisfied these factors. The Trustees have not yet articulated any available and feasible projects to restore the Hylebos Waterway to its pre-injury condition. The feasibility (and desirability) of returning the Hylebos to a 1870 mudflat/marshland is questionable at best.¹ Moreover, the trustees have not clearly specified what pre-injury condition they believe should be used as the desired objective for the Hylebos. Should it be the Hylebos as it existed in 1870? 1900? 1945? 1960? 1981? Arguably, the Hylebos is cleaner and provides greater ecological services today than it did in 1981.²

¹ Indeed, we note that one of the Trustees, the National Oceanic and Atmospheric Administration, may have an interest in keeping the Hylebos in its present condition, since the agency has investigated leasing moorage space at the mouth of the Hylebos Waterway for its vessels. See Minutes of the Puget Sound Real Property Council, July 27, 2000 at 3 (item f) (discussion of NOAA reviewing lease of moorage at Pier 23 from Army Reserve).

² There is ample reason not to proceed with natural resource restoration projects until (1) natural resource damage studies of Commencement Bay are completed, potentially allowing the Hylebos Waterway to be put in a meaningful context, and (2) an assessment can be made of the success of the

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If the Trustees intend to require mitigation projects outside of the Hylebos, the Trustees need to show that these projects would provide "services of the same type, quality, and comparable value to those that were lost." To do this, there must be a better understanding of precisely what services were lost **which were solely attributable to contamination from released substances**. While this kind of task is relatively simple when considering the replacement of seagrass lost in a pipeline accident, it is daunting when considering the century-long degradation of regional waterbodies from -- among other things -- development, agriculture, forestry practices, invasive species, and overfishing.

It is also far from clear that the Trustees have collected sufficient data to credibly assess the specific impacts to fish and wildlife in the Hylebos waterway. Much of the impact information relied upon in developing the proposal is generic to Puget Sound and Commencement Bay. For example, studies of English sole in other areas of Puget Sound may or may not be relevant to a discussion of injuries in the Hylebos itself. The Trustees have not demonstrated that sufficient data has been collected to satisfy the required HEA parameters.

In sum, the HEA methodology is clearly not capable of yielding a meaningful estimate of natural resource damages from industrial activities on the Hylebos. As applied to the Hylebos, the HEA approach is arbitrary and unreliable. The Trustees must use a more appropriate approach that places the Hylebos in the context of regional habitat degradation, considers other contributing factors, and offers feasible, reasonable restoration projects.

II. The Trustees' Allocations of Natural Resource Liability Are Arbitrary and Are Not Based On Credible Evidence.

Even assuming that the HEA methodology were well-suited to estimate specific natural resource damages at the Hylebos Waterway, the Trustees have built erroneous assumptions and biases into their analysis, at least with respect to Zidell Marine and the two properties the Trustees are allocating responsibility to Zidell Marine. Specifically, the Trustees are claiming Zidell Marine is responsible for the so-called Taylor Way Properties (map segment 4, site No. 47), a site where Zidell Marine never conducted any operations and a site that Zidell Marine never had any contact with. The second property is the so-called AK-WA Shipbuilding property (map segment 5, site No. 56), the large site at the mouth of the Hylebos where Zidell Marine conducted its operations on a relatively small portion of the site, generally along pier No. 25. In our opinion, the proposed allocation of natural resource damage liability to Zidell Marine is arbitrary and invalid.

Superfund cleanup work on sediments in Commencement Bay and the Hylebos itself. EPA, the Washington Department of Ecology, and the potentially responsible parties anticipate that the Superfund cleanup will have a significant restorative effect on Commencement Bay and the Hylebos Waterway.

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A. The "mass loading" approach for PAHs and PCBs is flawed.

The Trustees note that

Areas contaminated with polychlorinated biphenyls (PCBs) and polycyclic aromatic hydrocarbons (PAHs) are not readily susceptible to allocation by footprint because of the widespread distribution of these substances. For these substances, the Trustees use a mass loading approach, which relies on a relative comparison of the duration and area of operations associated with releases and of the extent to which the type of activities conducted at each facility is likely to have generated significant releases. Proposal at 18.

Although this approach was apparently developed "solely for settlement purposes" (*Id.* at 19), it is heavily biased and incapable of yielding any meaningful allocations of responsibility among the parties. The approach makes unwarranted assumptions about "likely significant releases" from selected historical operations, while completely ignoring other demonstrated sources. Zidell Marine recognizes that the Trustees' task of identifying contributing sources of contamination to the Hylebos must have a reasonable limit, but the Trustees have clearly not expended the effort necessary to complete even the relatively straightforward task of identifying the probable contamination sources. The mass loading approach quite arbitrarily assigns probabilities of releases of PAHs and PCBs to specific activities (e.g., shipbuilding/shipbreaking) with little or no factual information to substantiate the assumptions.

The Trustee's rely on the mass loading approach to assign heavy liability for PAHs and PCBs to both so-called AK-WA Shipbuilding and the Taylor Way properties, only one of which was formerly occupied in part by Zidell Marine. Yet it is obvious that much of the historic contamination of the Mouth of the Hylebos (the so-called AK-WA Shipbuilding property) originated upstream of the former Zidell Marine properties. Because the Mouth of the Hylebos receives the flow of contaminants from upstream sources, the mass loading approach creates an arbitrary bias against sources that happened to be located at the Mouth.³

³ Although the Trustees have asserted that tidal influences may have counteracted the distribution of contaminants to the Mouth of the Hylebos, the dispersion pattern at the Mouth strongly suggests that heavier contaminants such as PCBs were transported downstream into Commencement Bay.

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B. The presumption of PCBs releases from Zidell Marine's operations is erroneous.

The Trustees assign heavy responsibility for releases of PCBs to Zidell Dismantling (now Zidell Marine) and vessel maintenance activities at the AK-WA Shipbuilding site. This assessment is largely based on the supposition that PCBs were present in ships that were serviced or dismantled, and might have been released into the environment. However, the Trustees offer no compelling evidence that any significant quantity of PCBs actually were released to the Hylebos or Commencement Bay, certainly not from Zidell Marine's operations.

As noted by the Site Activity Report that is Appendix 2 of the Proposal, "[l]ubricating oils, diesel fuels, and other used oil which may have been recovered from ships [and which could contain PCBs] were sold by Zidell Marine to recyclers or users." Proposal, Appendix 2 at 4. Although one specific sale of waste oil from Zidell Marine's site on the Mouth of the Hylebos (the so-called AK-WA Shipbuilding property) is thought to have contained a flame retardant material, there is no objective evidence that the oil contained PCBs, that the oil came from Zidell Marine, or that the oil was ever released to the environment. *Id.* The Trustees' allocation of liability to Zidell Marine for PCBs is erroneous. Certainly, any claim that Zidell Marine is responsible for the so-called Taylor Way Properties is wrong.

C. The presumed volume of PAHs from Zidell Marine's operations is erroneous.

The Trustees have assigned to Zidell Marine substantial liability for releases of PAHs, both at the Mouth of the Hylebos (the so-called AK-WA Shipbuilding property) and at the Middle of the Hylebos (the so-called Taylor Way Properties). While it is clear that releases of PAHs have occurred from activities at the Mouth of the Hylebos since at least the early 1900's, Zidell Marine is implicated merely because waste oil and oily water was removed from ships being dismantled. With the exception of insignificant oil spills and larger spills that were contained and cleaned up, there is little direct evidence of significant releases of PAHs from Zidell Marine's operations.

Similarly, many of the PAHs in sediments at the Mouth of the Hylebos are pyrogenic PAHs, resulting from a combustion process (as opposed to petrogenic PAHs, which are uncombusted fossil fuels). Significantly, Zidell Marine did not operate combustion equipment or engage in activities (e.g., smelting) that would produce pyrogenic PAHs at the Hylebos. At a minimum, the Trustees have vastly overstated the contribution of PAHs from Zidell Marine's former operations at the Mouth of the Hylebos, which occurred on a relatively small portion of the so-called AK-WA Shipbuilding property.

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D. Zidell Marine has no responsibility for the middle of the Hylebos.

With respect to the Middle of the Hylebos (the so-called Taylor Way Properties), the Trustees have asserted that Zidell Marine may have released PAHs in connection with the sale of some 800,000 gallons of used oil to Fletcher Oil Company. As a result, the Trustees erroneously claim that Zidell Marine is responsible for contamination at the Taylor Way Properties. There is no evidence to suggest that oil was ever spilled or discharged into the Hylebos as a result of Zidell Marine's transaction with Fletcher Oil. Zidell Marine never sold or shipped oil to the Taylor Way Properties. The oil it sold to Fletcher Oil was not shipped to the Taylor Way properties. The Trustees' allocation of liability in this instance is wholly erroneous.

III. The Trustees' Report Erroneously Omits Significant Contributors to Natural Resource Damages at the Mouth of the Hylebos.

The Trustees' natural resource damage liability assessment is further flawed because it erroneously omits potentially significant contributors of contaminants. For example, looking only at the site of the former Zidell Marine property at the Mouth of the Hylebos where Zidell Marine generally operated along pier 25 of the so-called AK-WA shipbuilding property, there is evidence that several entities not included in the assessment in fact have been sources of contamination to the Hylebos, as follows.

A. The United States Army Reserve.

Since at least the 1980's, the area comprising Pier 23 (the most westerly of the three piers on the so-called AK-WA Shipbuilding property) and the adjacent shoreline at the Mouth of the Hylebos have been used extensively by the U.S. Army Reserve for training, equipment and supply storage, maintenance of ship components and equipment, and general administration. The facility is leased by the Army Reserve from the Port of Tacoma. The facility serves the Army Reserve's 385th Transportation Battalion, the 175th Floating Craft Company, the 185th Medium Boat Company, the 467th Transportation Terminal, and the 805th Logistics Support Vessel.

A Biological Opinion ("Opinion") was issued in October 2001 pursuant to the Endangered Species Act, in order to evaluate the potential impacts of proposed redevelopment of the Pier 23 property. That Opinion identifies several current, significant sources of contamination to the Mouth of the Hylebos area. Among other things, the Opinion notes that oil and grease-contaminated stormwater is discharged directly into Commencement Bay. Opinion at 3. Currently, equipment in use on the property discharges wastewater that can be 30 degrees F higher than water in Commencement Bay. *Id.* at 5. Heated wastewater can have significant impacts on salmon and other species. These impacts can include delayed migration, accelerated

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embryonic development, and the premature emergence of fish in winter rather than spring. To protect salmon and other marine organisms that require cooler water (18 degrees C or less), many states, including the State of Washington, have developed temperature limits as enforceable water quality standards. See, e.g., Washington Department of Ecology, Upper Humptulips River Temperature Total Maximum Daily Load Technical Report (September 2001) at 13.

Further, substantial maintenance work is performed by the United States Army Reserve on at least 32 Army Reserve vessels at Pier 23, as well as vessel maintenance training. Id. at 5-6. Hazardous materials are stored on the pier, including oil, anti-freeze, paints, and solvents. Id. at 5. In sum, vessel fueling and maintenance activities conducted by the Army Reserve since at least the 1980's have resulted in continuing discharges of contaminants into the waters of the Mouth of the Hylebos.

B. The State of Washington (the Washington National Guard).

From the early 1960's to the 1980's, the Washington National Guard used the Pier 23 area in the same manner that the U.S. Army Reserve now uses the facility. The Washington National Guard kept numerous vessels at Pier 23 for training purposes. As is the case with the U.S. Army Reserve, the Washington National Guard fueled, repaired, and maintained its vessels in and around Pier 23, and contaminants were discharged into the waters of the Mouth of the Hylebos.

C. Tyson Foods.

During the 1990's, Tyson Foods leased moorage facilities at the Mouth of the Hylebos from the Port of Tacoma for its fishing vessel fleet (on the so-called AK-WA Shipbuilding property). These vessels were fueled and maintained at the site.

D. Trident Seafoods.

Currently, Trident Seafoods leases moorage facilities at the Mouth of the Hylebos (the so-called AK-WA Shipbuilding property) from the Port of Tacoma for its fishing vessels. These vessels are fueled and maintained at the site.

E. Others.

Other entities using the so-called AK-WA Shipbuilding site at the Mouth of the Hylebos have potentially contaminated the Hylebos with various contaminants include Simon & Sons (dismantler of locomotive engines and transformers), Motorlife (oil additive manufacturer),

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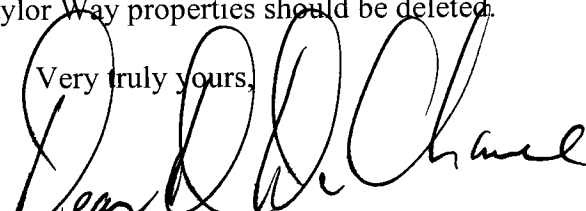
Coast Engine (conducted engine cleaning and maintenance in outside areas; stored oil onsite), and Sabrecraft (boatbuilder).

Similar omissions have likely occurred throughout the waterway. Under the Trustees' Proposal, omitted entities would be able to unfairly shift the entire burden for natural resource restoration to the named entities.

IV. The Trustees Must Use A More Reasonable Approach To Natural Resource Damage Liability Allocations And Identify Appropriate Restoration Objectives

The Trustees should not proceed with their current Proposal. A more objective and comprehensive approach to natural resource damage liability allocation must be used. Moreover, we believe that a more appropriate objective for natural resource restoration needs to be identified and supported with objective data. Proceeding with the current Proposal will only force a flawed, arbitrary allocation on the various parties and yield costly "restoration" projects that bear very little relation to lost ecological services. And, certainly, any so-called allocation to Zidell Marine for activities at the so-called Taylor Way properties should be deleted.

Very truly yours,



Dean D. DeChaine

cc:: Zidell Marine Corporation
Attn: Ms. Kathleen M. Thompson